



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 31, 1993

Mr. Michael J. Hutson  
Mounce & Galatzan  
Post Office Drawer 1977  
El Paso, Texas 79950-1977

OR93-176

Dear Mr. Hutson:

On behalf of the El Paso Independent School District, you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (formerly V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 23351.

The El Paso Independent School District received an open records request for an opportunity to look at the pictures of the students in the 1992-1993 Irvin High School Yearbook. In regards to this request, you ask this office to address the following five questions:

1. Are the pictures in the yearbook "education records" under the Family Educational Rights and Privacy Act of 1974 (FERPA)?
2. If the pictures are education records under FERPA, do they constitute "directory information"?
3. If the pictures are directory information, what type of public notice is satisfactory to permit the disclosure of the pictures under FERPA?

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<sup>1</sup>We note that the Seventy-Third Legislature codified the Open Records Act as chapter 552 of the Government Code and repealed article 6252-17a, V.T.C.S. See Acts 1993, 73d Leg., ch. 268, §§ 1, 46. The codification of the Open Records Act in the Government Code is a nonsubstantive codification. *Id.* § 47.

4. If the pictures are directory information, what is meant by a "reasonable time" to respond to the public notice?
5. If the pictures are directory information under FERPA, does the Texas Open Records Act restrict their disclosure?

Section 552.026 of the Government Code incorporates FERPA into the Open Records Act and makes FERPA prevail over other inconsistent provisions of the Open Records Act. Open Records Decision No. 431 (1985) at 3. Section 552.026 provides:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974 . . . .

FERPA denies federal funds to an educational agency or institution if it has a policy or practice of releasing certain information about students without written consent. 20 U.S.C. § 1232g(b)(1). Information that cannot be released includes "education records" and personally identifiable information, other than directory information, contained in education records. *Id.* "Education records" are defined in FERPA as records that "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A).

In response to your first question, the Family Policy and Regulations Office of the United States Department of Education<sup>2</sup> has advised us that yearbook photographs are education records under FERPA. Therefore, you may make the yearbook pictures available to the requestor in this case only in accordance with FERPA.

In your second question, you ask whether the pictures constitute "directory information" under FERPA. Directory information relating to a student is "information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3. Directory information includes but is not limited to the following kinds of information:

the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic

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<sup>2</sup>This office is responsible for administering FERPA at the federal level. Its duties include receiving and investigating complaints regarding violations of FERPA and advising educational agencies and institutions regarding compliance with FERPA.

teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

*Id.*; 20 U.S.C. § 1232g(a)(5)(A). Under FERPA, an educational agency or institution may release directory information about current students after it gives public notice of what categories of information the agency or institution has designated as directory information and allows a reasonable period of time after giving the notice to permit the parents or eligible students<sup>3</sup> to object to the release of any or all of the directory information without prior consent. 20 U.S.C. § 1232g(a)(5)(B). An educational agency or institution does not, however, have to follow this procedure before disclosing directory information about former students. 34 C.F.R. § 99.37(b); Open Records Decision No. 151 (1977) at 3.

The Family Policy and Regulation Office of the United States Department of Education has advised us that yearbook pictures may be classified as directory information under FERPA. Therefore, under FERPA, you have the discretion to disclose the yearbook pictures of former students without providing any notice. You also have the discretion to disclose the yearbook pictures of current students after you have given public notice that you will treat the yearbook pictures as directory information and after you have allowed a reasonable period of time for parents or eligible students to object to the release of the yearbook pictures.

Under the Texas Open Records Act, however, you have no discretion: The Open Records Act requires Texas educational agencies and institutions to treat as directory information all information that can be treated as directory information under FERPA. *See* Open Records Decision Nos. 96 (1975); 151 (1977); 242 (1980). In other words, while FERPA gives you the option of disclosing directory information after following the proper procedures, the Open Records Act requires that you follow any procedures applicable under FERPA and disclose all requested directory information unless a parent or eligible student objects to its disclosure. Thus, to respond to your fifth question, the Open Records Act does not restrict the disclosure of directory information more than FERPA. You must permit the requestor in this case to view the yearbook pictures of all former students. In addition, if you have not done so already, you must give public notice that yearbook pictures are directory information subject to disclosure and allow a reasonable period of time after giving the notice to permit parents or eligible students to object to disclosure. After completing these steps, you must disclose the yearbook pictures of all current students except the pictures of students under age 18 whose parents object to disclosure and of eligible students who object to disclosure.

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<sup>3</sup>Eligible students are students who are age 18 or over or who attend an institution of postsecondary education. Once a student becomes an eligible student, the parents' rights under FERPA attach to the student. 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.3.

Unfortunately, we are not able to answer your third and fourth questions. As we note above, you must provide public notice and a reasonable time to respond before you may disclose directory information regarding current students. Section 99.37 of title 34 of the Code of Federal Regulations addresses the conditions that apply to disclosing directory information. If you need more information about disclosing directory information, you should consult with the Family Policy and Regulation Office of the United States Department of Education.<sup>4</sup>

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll  
Assistant Attorney General  
Open Government Section

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Ref.: ID# 23351  
ID# 23369

cc: Mr. Dave Garcia  
KDBC-TV 4  
201 East Wyoming  
El Paso, Texas 79903

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<sup>4</sup>You may address your inquiries to:

Family Policy and Regulations Office  
Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202  
(202) 732-1807